## ADNAN BIN KHAMIS v. PUBLIC PROSECUTOR

**[F.C. (Ong C.J. (Malaya), Suffian, Gill, Ali and Ong Hock Sim F.JJ.) May 4, 1972]**

**[Kuala Lumpur — Federal Court Criminal Reference No. 4 of 1971]**

*Penal Code, s. 304A — Causing death by negligence — Standard of proof required — Onus.*

*Negligence — Criminal negligence — Standard of proof.*

This was a reference to the Full Bench of the Federal Court, by the High Court at Alor Star ([1971] 2 M.L.J. 231) pursuant to the provisions of section 66 of the Courts of Judicature Act, 1964.

The question of law to be determined was as follows: 'Whether the standard of proof on the prosecution on a charge under section 304A of the Penal Code is (i) a high degree of negligence similar to that required to support a conviction for manslaughter by negligence in England; or (ii) the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause'.

This reference was prompted in order to resolve the conflicting views which have been expressed on criminal negligence by the pre-Merdeka Courts of Appeal in other jurisdictions, namely, Borneo and Singapore, where the same law applies.

**Held:** (1) the test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct is to consider whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damages of injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury;

(2) the judgment delivered in *Cheow Keok* v. *Public Prosecutor*(1) must be regarded as *per incuriam* and must therefore be overruled. Accordingly, the answer to the first question must be in the negative, which implicitly provides the answer to the second question. In the result, the order of the High Court directing that the case be remitted back to the sessions court for the defence to be called, would be affirmed.

*Cheow Keok* v. *Public Prosecutor*(1) overruled.

*Per curiam:* "In the first place, mere carelessness or inadvertence, without more, is not enough, in our opinion, to establish guilt. An essential ingredient of all offences under the Penal Code is *mens rea;* although, in the context of culpable rashness or negligence, *mens rea* should not be understood as synonymous with 'criminal intention' or 'wicked mind'. Rather, it should be construed as connoting fault or blameworthiness of conduct. In the second place, the fault or blameworthiness must, as in all criminal cases, be proved by the prosecution beyond reasonable doubt — not, as in civil cases, on balance of probabilities."

*Cases referred to:-*

(1) *Cheow Keok* v. *Public Prosecutor* [1940] M.L.J. 103.
(2) *Lai Tin* v. *Public Prosecutor* [1939] M.L.J. 248.
(3) *Andrews* v. *Director of Public Prosecutions* [1937] A.C. 576.
(4) *R.* v. *Bateman* 94 L.J.K.B. 796; 19 C.A.R. 8.
(5) *Public Prosecutor* v. *Bachita Singh* [1940] M.L.J. 187.
(6) *Woo Sing* v. *R.* [1954] M.L.J. 200.
(7) *Public Prosecutor* v. *Mills* [1971] 1 M.L.J. 4.
(8) *Anthonysamy* v. *Public Prosecutor* [1956] M.L.J. 247.
(9) *Mah Kah Yew* v. *Public Prosecutor* [1971] 1 M.L.J. 1.
(10) *King Emperor* v. *Joti Prasad Gupta* A.I.R. 1932 All. 18, 22.
(11) *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107.
(12) *Kanji Juma* v. *King Emperor* A.I.R. 1938 Sind. 100.
(13) *Smith* v. *Emperor* A.I.R. 1926 Cal. 300.
(14) *Nidamarti Nagabhushanan* 7 M.H.C.R. 119.
(15) *Ogden Industries Pty. Ltd.* v. *Lucas* [1970] A.C. 113, 127.
(16) *R.* v. *Gosney* [1971] 3 W.L.R. 343, 347.

FEDERAL COURT REFERENCE.

*R. C. Murugeson* for the applicant.

*Gunn Chit Tuan* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Ong C.J. (Malaya)** (delivering the judgment of the Court): The question of law referred to this court by the High Court at Alor Star pursuant to the provisions of section 66 of the Courts of Judicature Act 1964 is as follows:—

"Whether the standard of proof on the prosecution on a charge under section 304A of the Penal Code is:—

(i) a high degree of negligence similar to that required to support a conviction for manslaughter by negligence in England; or

(ii) the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause."

Since the first definitive enunciation on criminal negligence was pronounced in 1939 by the Court of Appeal of the then Federated Malay States with reference to section 304A of the Penal Code, conflicting views have been expressed by the pre-Merdeka Courts of Appeal in other jurisdictions, namely Borneo and Singapore, where the same law applies. The term "negligence" appears in a different context under several sections of the Penal Code, apart from section 304A, with the result that doubts and difficulties have not infrequently been experienced, both in the subordinate courts, as well as by High Court judges in the exercise of their appellate criminal jurisdiction. This court has therefore been convened with a Full Bench of five judges, in order to resolve the question once and for all.

On July 11, 1939 the Federated Malay States Court of Appeal in *Cheow Keok* v. *Public Prosecutor*(1) laid down the law as to what constituted criminal negligence, upon a reference made to it pursuant to section 45A of the Courts Enactment.

Arising out of a fatal road accident, the appellant driver, Cheow Keok, was convicted by the First Magistrate at Kajang of causing death by a negligent act not amounting to culpable homicide, an offence under section 304A of the Penal Code. He appealed to the High Court at Kuala Lumpur and Aitken J. set aside the conviction and sentence, holding that, whilst the evidence disclosed a considerable degree of rashness or negligence — so that he would not have hesitated in substituting a conviction for the offence of dangerous driving in contravention of section 25 of the Road Traffic Enactment 1937, had he the power to do so — section 304A was nothing more than an attempt to codify the offence designated in English law as manslaughter by negligence; that the principles of English common law should be applied to such attempt at

codification and that the same high degree of negligence was necessary to support a conviction under the section as was required to support a conviction for manslaughter by negligence in England.

Upon appeal by the Public Prosecutor, the Court of Appeal, comprising Poyser C.J. (F.M.S.) McElwaine C.J. (S.S.) and Gordon-Smith J.A., affirming Aitken J., held that, according to English authorities, a very high degree of negligence must be proved before an accused person could properly be convicted on an indictment for manslaughter by negligence and that the *same degree of negligence* was required to prove an offence under section 304A of the Penal Code. The court overruled *Lai Tin* v. *Public Prosecutor*[2] a decision to the contrary by Murray-Aynsley J. (as he then was) and followed the House of Lords in *Andrews* v. *Director of Public Prosecutions*.[3]

The *ratio decidendi* of this judgment is thus abundantly clear. Whatever the nature and degree of negligence established, it must not fall short of what must be proved to establish the *felony* of manslaughter by negligence in English law, in order to support a conviction under section 304A. In the words of Lord Atkin in *Andrews'* case:

"a very high degree of negligence is required before the felony is established."

The term "*felony*" was applied in olden days to serious crimes because "they are intended to be done with a cruel, bitter, fierce or mischievous mind": see *Termes (Les) de la Ley*. This is significant because in *R.* v. *Bateman*,[4] referred to with approval by Lord Atkin, Lord Hewart C.J. had drawn the line as follows: —

"It is most desirable that in trials for manslaughter by negligence it should be impressed upon the jury that *the issue is not negligence or no negligence but felony or no felony.*"

Lord Atkin would appear, in our view, similarly to underline the distinction between statutory negligence and the sort of negligence which, in the words of Lord Hewart, amounted "to a crime against the State and conduct deserving punishment" — the standard of negligence required to establish the felony of manslaughter. His Lordship thus said (at page 584):—

"Section 11 imposes a penalty for driving recklessly or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter...."

In 1940, a few months after the above ruling, the Public Prosecutor sought reconsideration by the Court of Appeal of its views on criminal negligence where such negligence arose in totally different circumstances, in contravention of section 225A of the Penal Code. In *Public Prosecutor* v. *Bachita Singh*[5] the guard escorting a prisoner on a train journey suffered him to escape from custody. He was charged under section 225A for negligence and the learned magistrate trying the case acquitted him on the ground that the defendant's negligence, though the effective cause of the prisoner's escape, nevertheless did not amount to the high degree of negligence required for a conviction under section 304A.

It was, of course, impossible to suggest that, when the law of crimes has been codified in the Penal Code, the word "negligence" can mean one thing in one section and something different in another. Consequently, if *Cheow Keok* was to be binding authority thereafter, negligence in, for instance, suffering a prisoner to escape from custody (sections 223 and 225A), or negligence simply endangering the bodily safety of others (section 336), or resulting in hurt (section 337) or grievous hurt (section 338) would only be punishable as an offence provided that the same high degree of negligence can be established as for manslaughter by negligence under English law. The argument and submissions made by Mr. Hay, the deputy public prosecutor, were accordingly directed towards persuading the court that section 304A was never an attempt to codify the English law of manslaughter by negligence and *a fortiori* that the interpretation of criminal negligence given in *Cheow Keok* with special reference to manslaughter, and manslaughter only, required qualification where it has to be applied generally to all acts of negligence, however trivial, which are declared to be offences elsewhere under the Penal Code; otherwise the administration of justice would have been made extremely difficult.

The court was composed again of the same two Chief Justices as in *Cheow Keok*, but with Terrell J.A. in place of Gordon-Smith J.A. In reply to Mr. Hay who said: —

"All I want to do is to free ourselves from the necessity of having to find the very high degree of negligence that is required in England for manslaughter",

the learned Chief Justice (F.M.S.) thus expressed himself:—

"I think it is really a waste of time. It is all very interesting, but assuming that for the moment we have the power to go back on our own judgment I as a member of the court which gave that judgment have no intention of doing so...."

The court then proceeded forthwith to deliver its judgment as follows:—

"The case we are now asked to hold as having been wrongly decided, and not to follow, is the case of *Cheow Keok* v. *Public Prosecutor*. As however, we are of the opinion that that case was correctly decided, it is unnecessary for us to express any definite opinion as to whether we or future Courts of Appeal are bound to follow it or not.

In regard to whether the case abovementioned was correctly decided or not, we would only point out that section 304A of the Penal Code has, with one exception, always previously been interpreted as we interpret it, not only in Malaya but also in India, Ceylon, and other countries in which the Indian Penal Code has been adopted.

The only reported case brought to our notice, not in accordance with our decision, is the case of *Lai Tin* v. *Public Prosecutor*,[2] and the judgment in that case we were, and are still, unable to agree with. It, therefore, follows that 'gross negligence' or a 'high degree of negligence' must be proved before there can be a conviction under section 304A, and the same high degree of negligence must be proved to establish a conviction under the other sections of the Penal Code *which make 'negligent acts' a criminal offence.*"

*Cheow Keok*, having been thus reaffirmed by the highest tribunal in Malaya, became thenceforth authority for all courts in this territory. It held sway

unchallenged for 14 years. But it was not binding on the Court of Appeal in the Colony of Singapore and on September 8, 1954 Murray-Aynsley C.J. in *Woo Sing* v. *Regina*[6] was afforded an opportunity to re-assert the views he expressed in 1939 in *Lai Tin* v. *Public Prosecutor*.[2] The learned Chief Justice reserved the interpretation of section 304A for consideration by a Full Court and in his judgment (with which Pretheroe Ag. C.J. (F.M.) agreed) he said: —

"As regards interpretation, we are dealing with a code. In the first instance we study the words of the code itself. We are not justified in looking outside the code in order to give a special meaning to the words used in it. The classical exposition of the matter is found in Lord Herschell's judgment in *Bank of England* v. *Vagliano Bros.*[1] at p. 144 *et. seq.* The Penal Code is not a codification of English law. In numerous respects its provisions resemble the corresponding English law. In others, particularly as regards homicide, its provisions differ very greatly and deliberately so. In my opinion it is always dangerous to introduce English cases into the consideration of the Penal Code. The English law as to homicide remains unwritten and is still in a confused state, though of recent years there has been some clarification. But there still remains, in theory at least, constructive murder and constructive manslaughter. The Penal Code deliberately excluded the constructive offences and in sections 299 — 300 required certain specific intentions. In England involuntary manslaughter has always been very much tied up with the notion of constructive offences, in early times entirely so. It was the doing of an unlawful act, not the doing of a negligent act, that rendered a person guilty of manslaughter. In these circumstances the English law of manslaughter has no relevance in the interpretation of section 304A. In England negligence in any ordinary sense of the word is not the criterium of manslaughter. In *Bateman's* case[4] Lord Hewart C.J., said at page 798. 'It is most desirable that in trials for manslaughter by negligence it should be impressed on the jury that the *issue is not negligence or no negligence, but felony or no felony*'. I do not think that once this source of confusion is removed Courts need have any difficulty in the application of this section to particular cases. Different degrees of gravity can be treated by a suitable variation in the penalty, bearing in mind that section 304A involves offences of much less gravity than such as would come within the scope of manslaughter in England. I do not think it is necessary to lay down a different standard of negligence in civil and criminal cases, although, of course, a higher standard of proof is required in the latter cases."

Whitton J. also concurred subject only to this observation: —

"that a higher degree of negligence is necessary in order to establish a criminal offence than is sufficient to create civil liability."

On September 24, 1955 the Court of Appeal of Sarawak, North Borneo and Brunei, having to determine the same question in *Public Prosecutor* v. *Mills*,[7] was faced with the conflicting decisions in *Cheow Keok*[1] and *Woo Sing*.[6] In his judgment Williams C.J. said: —

"Careful comparison of (the definition of manslaughter under English law) with the crimes of murder, culpable homicide not amounting to murder, and killing by a rash or negligent act (sections 299-304A of the Penal Code) shows that what would be charged as manslaughter under English law, is under the Penal Code spread over sections 299, 300 and 304A. It is apparent therefore that section 304A at best only embraces a small proportion of what might be called manslaughter cases — only that proportion in fact which would be designated as involuntary manslaughter or manslaughter by negligence under English law, and not necessarily all of that.

Notwithstanding the opinion of *Ratanlal* in 'Law of Crimes' and the decision of *Cheow Keok* v. *Public Prosecutor* which was not followed in *Woo Sing & Anor.* v. *R.* I am of the opinion that the standard of negligence required for a conviction under section 304A(1) cannot be equated with that required for a conviction for manslaughter and that although the two crimes may and indeed do overlap they are essentially different. The main feature of the offence under section 304A(1) is the causing of death by doing an act which was rash or negligent but which was neither designed nor voluntary. The opinion expressed by the Full Court of Singapore in *Woo Sing & Anor.* v. *R., supra,* is, I consider, sound: it is to the effect that the Penal Code is not a codification of English law and it is dangerous, particularly in homicide cases, to try and introduce English case law into the consideration of the Code. English cases stress the grossness of the negligence necessary to constitute manslaughter but I am not prepared to hold that the acts of rashness or negligence which cause death must be of that very high degree before an offence under section 304A(1) can be committed."

The next case, in chronological order was *Anthonysamy* v. *Public Prosecutor*,[8] a High Court decision of Buhagiar J. on appeal from the sessions court. The appellant had been convicted under section 304A for causing the death of a man run down by the appellant's lorry while being driven at an excessive speed, close to the right hand side of the road. The president, in a rare display of independence, preferred to follow *Woo Sing* but, notwithstanding the lesser degree of negligence required, found the appellant guilty. On appeal Buhagiar J. declared that the president was bound by *Cheow Keok*, although he, the judge, considered that *Woo Sing* was the proper interpretation of section 304A. The evidence, however, disclosed the high degree of negligence enunciated in *Cheow Keok* and the appeal was on this ground dismissed. The learned judge was, of course, bound to follow *Cheow Keok* and he did. Nevertheless, he proceeded to give his reasons at length for preferring the decision in *Woo Sing*: though *obiter*, they are in our opinion entitled to be given considerable weight. Such also, we note with satisfaction, is the view which the Full Bench of the High Court in Singapore, unhesitatingly affirmed as correct in the recent case of *Mah Kah Yew* v. *Public Prosecutor*.[9]

We have caused search to be made in the registry for the judgment of Aitken J. in *Cheow Keok*,' but in vain. Still, the judgment of the Court of Appeal is sufficiently clear as to the learned judge's grounds of decision. When Mr. Hay, in *Bachita Singh's* case, spoke of Dr. Gour's commentary on section 304A as being the *fons et origo* of the *ratio decidendi* of Aitken J., this would seem to have been borne out by the Court of Appeal judgment where this passage appears (on page 107 of *Cheow Keok*): —

"This section (304A) did not appear in the original Indian Penal Code; it was added thereto by an amending Act of 1870. *Gour* (5th Ed. page 1044) states in regard to such amendment:

'This supplied an omission providing for the offence of manslaughter by negligence which had been provided for by the two clauses in the draft code but which appear to have been unaccountably omitted from the code when it was finally enacted.'

And at page 1045: —

'it (*i.e.* a rash or negligent act) corresponds exactly to what is designated in English law as manslaughter by negligence.'

Two Indian cases referred to by Mr. Draper, the learned deputy public prosecutor arguing the appeal in *Cheow Keok*, were mentioned by the court. One

was summarily rejected as irrelevant, being in respect of an offence under the Salt Act: *King Emperor* v. *Joti Prasad Gupta.*[10] The short reason given by the F.M.S. Court for rejecting this case was that the Salt Act was not, as section 304A was, a codification of English law. But what Mr. Draper said, and, with respect, we think it far from irrelevant, was in this passage, for which *Bank of England* v. *Vagliano Bros.*[11] was authority: —

"Here, in this country, where we have got definite Statutes, we have to follow the same. The rules of the common law of England or the legal maxims embodying certain judicial principles, however wholesome they may be, cannot be grafted upon the Penal Code."

The second case was *Kanji Juma* v. *King Emperor*[12] where the driver of a lorry carrying wooden sleepers was charged under section 304A because part of the load struck a pillar while passing through a narrow gate and in its fall killed a man standing by the roadside. In his judgment Davis J.C. said at page 102): —

"Section 304A is far wider in its terms than section 302 or section 304. It does not require either intention or knowledge to be proved .... section 304A like other sections of the Penal Code, requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. The phrase 'criminal negligence' as used in ordinary conversation conveys something of the meaning. Mere carelessness is not sufficient."

The F.M.S. Court of Appeal considered that the above judgment "in general was in accordance with the principles laid down in the most recent English cases of manslaughter by negligence." But the court appeared to have ignored what Davis J.C. quoted with approval (after citing both Indian and English authorities) from the judgment of Mukerji J. in *Smith* v. *Emperor*[13] as follows: —

"The question whether the accused's conduct amounted to culpable rashness or negligence therefore depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient in all the circumstances of the case."

We have referred in some detail to the above Indian cases because the F.M.S. Court of Appeal stated that, with the exception of *Lai Tin's* case,[2] section 304A had never been construed, as contended for by Mr. Draper, "either in India, Malaya, or in other countries where a criminal code based on the Indian Penal Code is in force." We have not the advantage of knowing what authorities the court had in mind as supporting the proposition it favoured. But in the only Indian case cited, certainly the view of Indian courts was otherwise.

We are greatly indebted to the late Mr. S. K. Das for his commentary* on Buhagiar J.'s judgment in *Anthonysamy*, tracing back to 1872 the earliest reported Indian case on the interpretation of section 304A: see *Nidamarti Nagabhushanan.*[14] There it was held that "culpable negligence" arises "in circumstances which show that the actor has not exercised the caution incumbent on him." Mr. Das's researches enabled him positively to say that "rashness or negligence" as meaning "culpable rashness or culpable negligence" had been the interpretation consistently followed by the courts in India. In our opinion, therefore, absence of authority, no less than its existence, is as persuasive and significant in showing that over the past 100 years no Indian court has yet declared, in the words of Dr. Gour, that section 304A "corresponds exactly" to manslaughter by negligence in English law.

It may be observed that, in *Nidamarti* the court emphasised that "not amounting to culpable homicide" forms part of the definition of the offence created by section 304A. By expressly excluding "culpable homicide", the section must, in our view, logically and necessarily exclude "manslaughter". In any form, "manslaughter" (whether by negligence or otherwise) is "culpable homicide". Where, therefore, the homicide in any case is *not culpable*, it cannot possibly be manslaughter under any circumstances. Hence, with respect to the learned judges who thought otherwise, it cannot possibly be correct to say that what is the essential ingredient in manslaughter by negligence is equally vital to sustain a conviction under section 304A.

A simple illustration will suffice to show why we think the decision in *Cheow Keok* cannot be supported. Take, for instance, the offence under section 223 committed by a public servant negligently suffering any person in his custody to escape. Where a jailor falls asleep on duty and suffers a prisoner under his charge to pick his pocket and obtain the key to his cell, thereby making good his getaway, his negligence consists merely in falling asleep. How possibly can such passive negligence reach the heights of negligent acts causing loss of life? Should the accused be acquitted of a clear offence under section 223 because the prosecution is required by the *Cheow Keok* decision to perform an impossible feat? Unless the law is to be stultified, it must be so interpreted that negligence must bear the same meaning throughout the Penal Code.

The conflicting decisions given in *Cheow Keok* and in *Woo Sing* undoubtedly stemmed from the different views taken by the respective courts on the construction of statutes. Whereas the F.M.S. Court of Appeal did not appear to have it in mind, Murray-Aynsley C.J. referred expressly to the House of Lords decision in *Bank of England* v. *Vagliano Bros.*,[11] where Lord Herschell said (at page 144): —

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, ...."

These principles have recently been reiterated by the Privy Council in *Ogden Industries Pty. Ltd.* v.

* [1957] M.L.J. vi.

*Lucas*[15] where Lord Upjohn delivering the judgment of the Board said: —

"... in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.

These general principles are particularly important when questions of construction of statutes are in issue.

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.

No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment."

For the reasons above stated we are unanimously of the opinion that the judgment delivered in *Cheow Keok* must be regarded as *per incuriam.* Accordingly the answer to the first question must be in the negative. This answer implicitly provides the answer to the second question, which is the alternative to the first. In the result we would affirm the order of the High Court directing that the case be remitted back to the sessions court for the president to call on the defence.

Having overruled *Cheow Keok,* the question remaining to be answered is: How are the courts hereafter to construe "negligence" arising in a wide variety of circumstances and rendered punishable under fourteen different sections of the Penal Code? In other words: What degree of negligence becomes culpable? Unless this is clarified, confusion may be worse confounded.

To serve any practical purpose the answer should be clear and precise. In the first place, mere carelessness or inadvertence, without anything more, is not enough, in our opinion, to establish guilt. An essential ingredient of all offences under the Penal Code is *mens rea;* although, in the context of culpable rashness or negligence, *mens rea* should not be understood as synonymous with "criminal intention" or "wicked mind". Rather, it should be construed as connoting fault or blameworthiness of conduct. In the second place, the fault or blameworthiness must, as in all criminal cases, be proved by the prosecution beyond reasonable doubt — not, as in civil cases, on balance of probabilities. Once these principles have been grasped, we think the test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct is to consider whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury. This test is partly objective and partly subjective — objective in the sense that the situation must be one fraught with potential risk of injury to others or whatever consequences contemplated in any particular section of the Penal Code. It is also subjective in that such a situation should have arisen by reason of some fault on the part of the accused: see *R.* v. *Gosney*[16] *per* Megaw L.J. at page 347.

Negligence as an offence, varies in gravity, according to the consequences flowing therefrom. This is reflected in the range of punishment provided for different offences. Accordingly, in the words of Murray-Aynsley C.J. we consider that "different degrees of gravity can be treated by a suitable variation in the penalty".

Needless to say, in the case of fatal road accidents, section 304A of the Penal Code seems to have been rendered practically redundant by section 34A of the Road Traffic Ordinance 1958. We can hardly imagine any circumstances in which a charge under section 304A may be resorted to by choice in preference to a charge under section 34A of the Ordinance. Similarly section 279 of the Penal Code must be regarded as obsolescent, if not a dead letter, except for riders of horses.

*Reference answered.*

Solicitor: *R. C. Murugeson.*